# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

MARIA AMACKER, ET AL.,
*Plaintiffs in Error,*
*vs.*
NORTHERN PACIFIC RAILROAD CO.,
*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

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FILED
APR 20 1893

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The points attempted to be made by defendant in error under point One of his argument, subdivision A, are:

1st. That the filing of the declaratory statement is not such a right as is contemplated in section one of the grant as a reservation from the grant.

2d. That the presumption was upon the defendant below to prove the right to file; and

3d. That the statement itself is not evidence of the citizenship of the pre-emption declarant.

As to first claim of defendant in error:

The position taken by counsel for defendant in error under this head, is practically that no pre-emption right is excluded from the grant, unless the claimant had actually proved up in the legal land office, and paid the purchase price,—in other words, not until the filing of the entry.

It is submitted that Congress meant something by the terms "pre-emption," "claims," and "rights." It meant to except something which, without that limitation, would have been included within the terms of the grant. It needed no words by Congress to exclude from the grant land included within a pre-emption entry, as defined by counsel for defendant in error, for the law itself would interpret a grant by the United States not to include any property to which the United States did not have a title, or which it had already conveyed to others, or which it was in duty, equity and conscience bound to convey to others. The pre-emption entry, as defined by counsel, is complete only when claimant has proved up, as it is called, and has paid the purchase price of the land to the legal agents of the United States. When that is done the Government has nothing left save the bare legal title, and holds that title subject to the equity of the pre-emption claimant. Whoever took the land from the Government would

take it with notice of that right subject to the same equity. To quote counsel himself, on pages 10 and 11:

"A valid pre-emption entry vests the entryman with an equitable title to the land entered, of which not even Congress can deprive him. The entry, whether made under the pre-emption, homestead, or other public land law, operates to segregate the land entered from the mass of public lands. It reserves and appropriates the land. Its allowance requires the exercise of *quasi* judicial functions on the part of the land officers; and, if the land be subject to entry, their decision, until reversed by their superior officers, and the entry cancelled, preserves the land from other disposition."

*H. & D. R. R. Co. vs. Whitney*, 132 U. S., 363-4.

It is quite apparent that it is not such a right that Congress in its wisdom found necessary to exclude from the grant to the defendant in error. A pre-emption right or claim is not a pre-emption entry; it is the right to make an entry, or right to prove up or right to purchase. In some of the cases cited, and in our opinion quite properly, it is treated as nothing more nor less than a contract which is of quite common occurrence among private individuals. It is an option given, it is true, by the Government to an individual, and which may be recalled by the Government at any time before actual proof and payment—a right which the Government could have revoked—a right which would have lapsed had the Government seen fit to include the lands covered thereby in the grant itself, as it did in the cases cited by counsel known as the Yosemite cases, and also the case of Frisby vs. Whit-

ney. All of the cases cited by counsel are cases which come under either such facts as existed in the Yosemite cases, and of course are not applicable here.

See Shepley vs. Cowan, 91 U. S., 330, or they come under the rule as laid down in the case of Bohall vs. Dilla, 114 U. S., 47, where there is a conflict between two pre-emption claimants, the first claimant not having proved-up in time, thus making the land, by the terms of the pre-emption law itself, "subject to the entry of any other purchaser." That the claim or right of Scott was such as would not be included within the grant, we think is abundantly shown in Shepley vs. Cowan. See also Whitney vs. Taylor, 45 Fed. Rep. 616, and counsel himself seems unable to escape that conclusion. On page 22 he quotes from 112 U. S., and other cases which, to us, certainly drew a distinction between an entry and a pre-emption right. It is impossible to read his citations without reaching the conclusion that the pre-emption right is not an entry: it is something that proceeds the entry, in fact it is that without which there could be no entry; a right to a thing is certainly not the thing itself.

The next point which counsel makes under this heading is that it must be shown that Scott was at least possessed of the legal qualifications of a settler or claimant, that the burden of proof is upon us to show that the land was not included within the grant, and that the declaratory statement is not sufficient to prove that Scott was a citizen of the United States. As to the question upon whom the burden of proof would be, again we differ with counsel. It is quite common to look upon land covered by claims, as being within the

general theory of the exception or reservation of the grant. But the law itself did not create the exception; it merely granted to the Railroad Company lands of a certain description. It does not grant to the Railroad Company a large body of land "excepting and reserving from the grant such possession of the land as may be subject, etc." The distinction is quite clear. Lands which were conveyed to the company are lands belonging to the United States at the time of the grant, and to which no other rights have attached. That is not an exception or reservation from the grant, when strictly speaking, although in common parlance, and where the question of proof is not involved it amounts to practically the same thing. That counsel for defendant in error had a different opinion during the trial of the case, was quite apparent from the conduct of the case in the Court below, where he assured the plaintiff of believing that the land was free from all claims. It will be seen on pages 24, et seq., of the record, that he did assume this position.

Again referring to the record on page 27, the declaratory statement of Scott will be found in which Scott is described to be a native-born citizen of the United States. On the top of the same page Scott testifies that he is the Scott mentioned in that paper. The presumption of law is that a person within the United States is a citizen of the United States. [See Garfield M. & M. Co. vs. Hammer, 6 Mont., 53, and cases cited on page 60.]

Again, in our opening brief, we have cited cases which are conclusive as to the rule that the filing being of record in the proper office, uncancelled, is final, and that the policy of

the Government and of the law will not permit defendant in error to question the validity of that record at this time.

The points B and C are fully answered in our opening brief. Whether or not the burden of proof was upon us—whether or not we should have shown that Scott was a citizen of the United States—whether or not the findings may be sufficient to sustain the judgment, we respectfully submit that the Court erred in allowing, over our objection, witness Scott to testify that he ever abandoned the land; and for that error alone the case should be reversed. It is not probable that unless actual perjury is shown any case more than these cases will justify the language of the Court in the Railroad Company vs. Dunmeyer, and Railroad Company vs. Whitney, to the effect that it was not the policy of the Government to allow any controversy contradicting the records to be carried on between a corporation on the one side and settlers on the other. Scott testified that he left the land in the fall of '69 and never returned to it, and in the opinion of the Court it will be found that he further testified that he removed to the town of Helena and then went to Butte, and yet on page 32 of the record we find that he amended his filing on Oct. 20th, 1869. After the filing of the map of the general route he again amended his filing on Oct. 14th, '72. We submit that the record is such a contradiction of his testimony as will strongly justify the position taken by the Supreme Court of the United States in cases last cited.

Upon the question of burden of proof we again submit that the theory of the cases, Railroad Company vs. Whitney and Railroad Company vs. Dunmeyer and the other cases

cited on pages 18 and 19 of our former brief are conclusive, the filings being of record in the land office uncancelled. See finding 10, page 40 of the record, that the land is not included within that grant, and that the company cannot dispute the record. If the contention of the defendant in error that we must show that the land is excepted from the grant, and that we must prove citizenship settlement and occupation, is correct, then it would seem that the proper course for the company to pursue would be to remain silent, until, by lapse of time or dispersion of witness, it would be impossible to show these facts. Moreover, and this applies to the question of settlement—the good faith of McLean, raised subsequently in the brief of the defendant in error—it appears from the record, in the findings, that this whole matter was contested in the land office. and although the rule is that the question of law decided by the land department is not controlling on the Courts, nevertheless the facts found, and necessary to be found, and which are also subject to review in the land department, are final. See cases cited. page 26. in our brief.

Upon the remaining question in the brief of the defendant in error. we are content to rest upon the brief already filed.

Respectfully submitted.

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